86-1103

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In the

SUPREME COURT OF THE UNITED STATES

Term,

DEMETRIOS PAPADAKIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner, as a Grand Jury subpoenee, was justified in invoking his Fifth Amendment privilege where he reasonably concluded that a proffer of immunity pursuant to 18 U.S.C., 6002 and 6003 was not coextensive with his Fifth Amendment privilege against self incrimination.

2. Whether the District Court's five-year sentence for criminal contempt was a violation of the Petitioner's right against double jeopardy and to due process where the Petitioner's sentence was unlawfully enhanced and where the Petitioner was effectually twice punished for the same alleged offense.

3. Whether the Petitioner has waived his claim of Grand Jury abuse and double jeopardy violations.

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PRAYER

Petitioner, Demetrios Papadakis, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Opinion and judgment of the United States Court of Appeals of the Second Circuit dated September 29, 1986 appears in Appendix A attached hereto. (A Petition for Rehearing En Banc was filed before the United States Court of Appeals for the Second Circuit, but only as to the issues of the impropriety and the excessiveness of the sentence.)

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit was entered on September 29, 1986. (The Petitioner had filed a Petition En Banc, as indicated above.) This Petition is filed pursuant to a motion for an extension of time to file said Petition. The expiration date for the filing of said Petition is December 29, 1986. Jurisdiction is invoked under 28 U.S.C., Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law;".

STATEMENT OF THE CASE

On December 12, 1982, $11,000,000 of food stamps were stolen from the Sentry Armored Car Company warehouse in the Bronx, New York. On February 15, 1983, the Petitioner, DEMETRIOS PAPADAKIS, and other co-defendants, were indicted for conspiracy, theft from interstate commerce, and theft of food stamps.

Superceding indictments were filed later in 1983, adding two additional defendants, STEVEN ARGITAKOS and NICHOLAS GREGORY. NICHOLAS GREGORY was not arrested at that time.

The Petitioner, PAPADAKIS, was admitted to bail at that time and was acquitted by a jury after a two-month

trial on December 7, 1983. All other co-defendants were convicted.

One year after Petitioner PAPADAKIS' acquittal, four months after the arrest of NICHOLAS GREGORY, and one day after an indictment was obtained against NICHOLAS GREGORY, PAPADAKIS was subpoenaed on December 7, 1984, for the stated purpose of telling the Grand Jury where a portion of the $11,000,000 was hidden. Ultimately, the Petitioner was granted immunity pursuant to 18 U.S.C. 6002 and 6003.

Upon the Petitioner's refusal to testify on December 11, 1984 he was held in civil contempt after a hearing before Judge Knapp in the United States District Court for the Southern District of New York. The civil contempt Order was affirmed by the United States Court of Appeals for the Second Circuit on January 18, 1985.

At no time before or during the year that passed since the Petitioner's acquittal on December 7, 1983, was the Petitioner subpoenaed by the government to testify about the Sentry theft.

On September 4, 1984 NICHOLAS GREGORY was arrested. On December 6, 1984, the Grand Jury for the Southern District of New York, returned a new indictment, charging GREGORY and three additional co-defendants with numerous counts, including conspiracy, bank larceny, interstate transportation of stolen property, false statements, perjury, obstruction of justice, harboring a fugitive and accessory after the fact. A jury trial commenced on February 7, 1985 and ended on March 7, 1985 with GREGORY and one co-defendant convicted and one co-defendant acquitted.

The government, through the United States Attorney for the Southern District,

made a series of statements evidencing its intent to prosecute the Petitioner in the future, based upon any Grand Jury testimony given by the Petitioner, and not to honor the immunity grant provided by the District Court's Order. On December 10, 1984, during oral argument on a motion brought by the Petitioner to quash the subpoena, the District Court asked the United States Prosecutor:

> "As far as you know, do they plan to indict this man?"

The Assistant United States Prosecutor answered:

> "We have not heard his evidence."

PAPADAKIS remained incarcerated pursuant to the civil confinement Order until June 18, 1985. After a hearing on June 7, 1985, Judge Knapp issued an Order releasing PAPADAKIS from confinement, pursuant to the civil contempt Order.

During the time that the Petitioner was confined under civil contempt, the government again made express remarks on the record concerning its intentions to prosecute the Petitioner in the future because of the evidence obtained since the Petitioner's acquittal on December 7, 1983. The following statements were made by the Assistant United States Prosecutor:

> "The Court: There is no question in my mind that he is probably guilty of the crime of which he was acquitted but he can't be retried on that crime, and...
>
> Mr. Garcia: Perhaps not, Your Honor. However, since the conspiracy is a continuing conspiracy, as Judge Weinfeld described it at the GREGORY trial, it is a conspiracy to obstruct the investigation and conceal the monies for at least five years based on the evidence that the GREGORY trial that...(sic) was that they perceived to be the Statute of Limitations.

* * *

> The Court: But he's not indicted.
>
> Mr. Garcia: He is not indicted yet, Your Honor, however, we now face the prospect that he will be released...".

PAPADAKIS was then indicted for criminal contempt on June 19, 1985 and was convicted after a trial upon stipulated facts on March 10, 1986, and was sentenced on April 10, 1986 to a five-year term of imprisonment.

At the time of the sentence, Judge Edward Weinfeld clearly stated his reasons, on the record, for imposing a "substantial sentence":

> "The Court: On the totality of the record of both Sentry trials, this Court has not the slightest doubt, as the government charges, that PAPADAKIS was an active participant in the staged holdup and received in excess of $2,000,000."

Although PAPADAKIS was never convicted of any substantive charges, the

sentencing Court, at the time that PAPADAKIS was sentenced for criminal contempt, stated its belief that PAPADAKIS was in fact guilty of the substantive charges.

By Judgment dated September 29, 1986, the Petitioner's conviction and sentence for criminal contempt was affirmed by the United States Court of Appeals for the Second Circuit. (Judgment annexed as Appendix A.) Thereafter, the Petitioner filed a Petition for Rehearing En Banc before the United States Court of Appeals for the Second Circuit on the issues of the impropriety and the excessiveness of the sentence of five years imposed on PAPADAKIS upon the conviction of criminal contempt. Said Petition for Rehearing En Banc affirmed the Court of Appeals' Judgment decided on September 29, 1986.

REASONS FOR GRANTING THE WRIT

With regard to the first question:

> " 'A witness may properly invoke the (Fifth Amendment) privilege when he reasonably apprehends a risk of self incrimination,...though no criminal charges are pending against him...and even if the risk of prosecution is remote.' "

In re Corrugated Container Anti-Trust Litigation, 620 F.2d 1086, 1091 (5th Cir. 1980) cert. den. 449 U.S. 1102... (1981). Quoting Wehling v. Columbia Broadcast System, 608 F.2d 1084, 1087, n.5 (5th Cir. 1979).

> "The privilege must be sustained if it is not 'perfectly clear' that the witnesses' answers 'cannot possibly have a tendency to incriminate.' Hoffman v. U.S, 341 U.S. 479...(1951).

On at least three occasions, in this case, the government Prosecutor stated in open court that the Petitioner

might be prosecuted in the future. Those statements were made after the District Court granted "immunity" to the Petitioner pursuant to 18 U.S.C. 6002 and 6003.

In addition to the incident set forth in the STATEMENT OF THE CASE above, the Assistant United States Prosecutor for the Southern District made the following remarks in open court before Judge Knapp:

> "The Court: There is no question in my mind that he is probably guilty of the crime of which he was acquitted, but he cannot be retried on that crime and...
>
> Mr. Garcia: Perhaps not, Your Honor...
>
> The Court: But he is not indicted.
>
> Mr. Garcia: He is not indicted yet, Your Honor..."

The issue for PAPADAKIS was whether, given the immunity conferred by the Court Order, did the Petitioner, nevertheless, have a right to assert his Fifth Amend-

ment privilege and refuse to testify. Stated another way, was this immunity coextensive with the Petitioner's Fifth Amendment privilege (Kastigar v.U.S., 406 U.S. 441 (1972)) thereby stripping him of the privilege, and rendering his refusal to testify punishable as criminal contempt. Based upon the Assistant United States Attorney's remarks it is clear that any Grand Jury testimony given by PAPADAKIS, even under a grant of immunity, could result in a future indictment relating to a 'continuing conspiracy to obstruct the investigation and conceal the monies'. For this reason, PAPADAKIS did have a right to assert his Fifth Amendment privilege because the "immunity" granted would not have been coextensive with his Fifth Amendment privilege.

For the above reasons the Petitioner's conviction on criminal contempt, for his

failure to testify before the Grand Jury under a grant of immunity, violated his Fifth Amendment privilege against self incrimination.

With regard to the second question: The sentencing Judge, in the United States District Court for the Southern District of New York, stated that it did not have the slightest doubt that PAPADAKIS was guilty of the government charged; and that PAPADAKIS was an active participant in the Sentry Armored Car theft. Though he paid lip service to PAPADAKIS' acquittal the Judge explicitly imposed punishment on the Petitioner for his alleged participation in offenses for which he was previously acquitted. This second attempt to punish the Petitioner for alleged crimes of which he was previously acquitted violates due process, U.S. v. Washington, 586 F.2d 1147 (CA Illinois 1978), U.S. v. Tucker, 404 U.S. 443 (1982),

and the double jeopardy clause, Ohio v. Johnson, 104 S.Ct. 2536 Rehearing den., 105 S.Ct. 20, North Carolina v. Pearce, 395 U.S. 711.

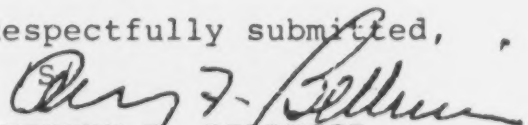
With regard to the third question: The Petitioner maintains that he has a right to set forth a claim that the government's actions, in causing a subpoena to be issued, and in prosecuting PAPADAKIS for criminal contempt, violated the Petitioner's rights against double jeopardy. The United States Court of Appeals for the Second Circuit, in its decision, affirming PAPADAKIS' conviction, determined that the Petitioner had waived this claim. The Advisory Committee notes to the Federal Rules of Criminal Procedure 12(b)(1) and (f) specifically state that the claim of double jeopardy need not be asserted in a pre-trial motion, and that failure

to make such a double jeopardy claim, does not constitute a waiver. Nevertheless, the United States Court of Appeals for the Second Circuit, though recognizing the standards set forth in the Advisory Committee notes under the Federal Rules of Criminal Procedure, still determined that the Petitioner had waived his right to claim any and all double jeopardy violations on the appeal of his conviction for criminal contempt. This issue of "waiver" of constitutional rights is an important threshold issue upon which this Court should rule.

CONCLUSION

Upon the foregoing reasons, Petitioner, DEMETRIOS PAPADAKIS, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 30 August Term 1986

Argued: August 25, 1986 Decided: September 29, 1986

Docket No. 86-1190

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UNITED STATES OF AMERICA,

Appellee,

-against-

DEMETRIOUS PAPADAKIS,

Defendant-Appellant.

----------X

Before: FEINBERG, Chief Judge, CARDAMONE, Circuit Judge, and KELLEHER, */ District Judge

Appeal from judgment of the United States District Court for the Southern District of New York, convicting defendant of one count of criminal contempt pursuant to 18 U.S.C. § 401, for failing to testify before a grand jury despite a grant of

*/Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation

immunity.

Affirmed.

JONATHAN BOXER, Westbury,NY (Burns, Berger & boxer, Esqs. Morris Gindi, of Counsel), for Defendant-Appellant.

ROBERT GARCIA, New York, NY, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Bruce A. Green, Assistant United States Attorney, of Counsel) for Appellee.

FEINBERG, Chief Judge:

Demetrious Papadakis appeals from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, J., convicting appellant of one count of criminal contempt, in violation of 18 U.S.C. § 401, and sentencing him to five years in prison. Papadakis had refused to testify before a grand jury, despite a grant of use and derivative use immunity pursuant to 18 U.S.C. §§ 6002 and 6003. In this appeal, Papadakis argues that his conviction

was the product of prosecutorial vindictiveness, violated his Fifth Amendment privilege against self-incrimination and subjected him to double jeopardy. He also claims that his sentence is disproportionate to the crime committed and was based on improper considerations.

For the reasons given below, we affirm the judgment of the district court.

I.

This appeal arises out of the government's continuing efforts to prosecute the individuals responsible for the theft from the Sentry Armored Courier Corporation in the Bronx in December 1982 of approximately $11 million and to recover some $10 million of that sum that is still missing. We are told that this was the largest cash theft in this country's history. To date, six defendants have been tried and convicted for crimes growing out of this theft.

Demetrious Papadakis was indicted for the Sentry theft in April 1983, along with Christos

Potamitis, Eddie Argitakos, Steve Argitakos and Nicholas Gregory, and was charged with multiple counts, including bank larceny and conspiracy. Following a jury trial before Judge Weinfeld, Potamitis and Eddie Argitakos were convicted of bank larceny, interstate transportation of stolen property, conspiracy and other offenses, and Steve Argitakos was convicted of being an accessory after the fact. Papadakis was acquitted. Gregory was a fugitive at the time and did not stand trial. This court affirmed the convictions in United States v. Potamitis, 739 F.2d 784 (2d Cir.), cert, denied, 105 S. Ct. 297, 332 (1984).

Gregory was arrested in September 1984.[1/] Shortly thereafter, Papadakis was issued a subpoena commanding him to testify before the grand jury in the Southern District of New York that was conducting a continuing investigation of the Sentry theft. Before the subpoena was served, the government obtained an order authorizing it to grant Papadakis

use and derivative use immunity pursuant to 18 U.S.C. §§ 6002 and 6003. That order provided that Papadakis's testimony before the grand jury could not be used against him in any criminal case, unless he committed perjury, gave a false statement or otherwise failed to comply with the order.

Following several adjournments, a new subpoena was issued in December 1984. Papadakis appeared before the grand jury the next day and was granted use and derivative use immunity after he invoked his Fifth Amendment privilege against self-incrimination in response to questions concerning the Sentry theft. He then unsuccessfully sought to quash the subpoena. When Papadakis reappeared before the grand jury, he again refused to answer any questions concerning the Sentry theft. Judge Whitman Knapp of the Southern District then held Papadakis in civil contempt and ordered him incarcerated. The civil contempt order was affirmed by this court in In

re Papadakis, No. 84-6369 (2d Cir. Jan. 18, 1985). Papadakis remained incarcerated on that charge until June 18, 1985.

Papadakis was indicted for criminal contempt on June 18, 1985. He did not surrender, but remained a fugitive until his arrest in Atlantic City six months later, with $10,000 in cash and casino chips in his pocket. Papadakis was convicted of one count of criminal contempt following a one-day trial on stipulated facts before Judge Weinfeld in March 1986. This appeal followed.

II.

We first consider Papadakis's argument that the government's decision to subpoena him was the product of prosecutorial vindictiveness. Papadakis contends that he was subpoenaed not in order to aid in the grand jury's continuing investigation of the Sentry theft, but rather to make trouble for him because of his acquittal at the first

Sentry theft. Papadakis presented a general claim of grand jury abuse on his appeal from the order of civil contempt. See In re Papadakis, No. 84-6369 (2d Cir. Jan. 18, 1985). That panel's determination, that the government had "compelling and legitimate reasons for seeking Papadakis's grand jury testimony," is the law of the case, and the general claim of grand jury abuse may not be reargued in this appeal. See Zdanok v. Glidden Co., Durkee Famous Foods Division, 327 F. 2d 944, 952-53 (2d Cir.), cert. denied, 377 U.S. 934 (1964).

Appellant's principal argument on this appeal is that he should have been permitted to invoke his Fifth Amendment privilege to remain silent because he reasonably perceived that, regardless of the content of his testimony, he would be indicted despite the grant of immunity. Papadakis claims that during the various Sentry proceedings, the

government had elicited conflicting statements from two defendants, Eddie Argitakos and Howard Marshall, and that depending on the content of his testimony before the grand jury, it would use one of those statements to prosecute him for perjury. Papadakis views certain statements in the district court by the Assistant United States Attorney, refusing to foreclose the possibility that Papadakis might be indicted in the future even after the grant of immunity, as proof that his apprehensions about testifying were reasonable. Papadakis contends that the subpoena was a trap that rendered the grant of immunity inadequate to protect his constitutional privilege against self-incrimination, thereby reviving his Fifth Amendment right to remain silent.

This claim was also apparently raised in Papadakis's appeal from the civil contempt order, although the claim was not

as fully fleshed out at the time of that appeal because the testimony in the Gregory trial had yet been obtained. However, assuming that this difference justifies our considering the claim on the merits, we reject appellant's contention that the threat of an indictment for perjury justified his refusal to testify before the grand jury. Had Papadakis testified truthfully, his testimony would not have been incriminating with respect to the crime of perjury. In the absence of a threat of self-incrimination, appellant did not have a constitutional right to remain silent based solely on the possibility of being wrongfully indicted. Appellant's protection against this abuse lies not with the Fifth Amendment, but in the proper working of the judicial system --first, that the grand jury will not indict, and second, that a court will not convict him for perjury on the basis of truthful testimony. Moreover, to the extent

that appellant is also claiming that the truthful testimony might later be used to indict him for crimes other than perjury, the grant of use and derivative use immunity is "coextensive" with the scope of his privilege under the Fifth Amendment, Kastigar v. United States, 406 U.S. 441, 453 (1972), and sufficient to protect him against such improper use of his testimony. Appellant's reliance on In re Corrugated Container Anti-Trust Litigation, 620 F.2d 1086 (5th Cir.1980), cert. denied sub nom. Adams Extract Co. v. Franey, 449 U.S. 1102 (1981), is misplaced. In that case, the court found that the individuals subpoenaed "had not been -- in fact, could not have been -- granted immunity." Id. at 1093.

Had Papadakis testified untruthfully, his testimony, although incriminating, would not have been obtained in violation of his constitutional rights. The Fifth Amendment

does not shield witnesses from the adverse consequences flowing from their untruthful statements:

> The immunity granted by the Constitution confer upon the witness the right to perjure himself or to withhold testimony. The very purpose of the granting of immunity is to reach the truth, and when the testimony is incriminatory, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood ... such conduct is not entitled to immunity (footnote omitted).

United States v. Tramunti, 500 F.2d 1334, 1343-44 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Thus, Papadakis was properly subpoenaed to testify, and contrary to his contention, he was not caught in a trap that implicated his Fifth Amendment rights. If he had testified truthfully under the grant of immunity, he would not have incriminated himself, and if he had perjured himself, he would not have been entitled to protection under the Fifth Amendment. Accordingly, Papadakis's claim under the Fifth Amendment must fail.

Appellant also claims that the prosecution for criminal contempt was tantamount to a second prosecution for the charges on which he had already been acquitted, and was therefore barred by the double jeopardy clause. We need not reach this claim because appellant has waived it by raising it for the first time on this appeal. See United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977). Appellant mistakenly relies on the Advisory Committee Notes to Rule 12(b) of the Federal Rules of Criminal Procedure in contending that he was not required to raise this claim in the district court. Those Notes, even if controlling, suggest only that a claim of double jeopardy does not have to be asserted as a pre-trial motion. They do not suggest that such a motion need not be presented to the trial court at all.

III.

In addition to challenging his conviction,

Papadakis also claims that his sentence should be reduced. Congress did not specify a range of penalties in the criminal contempt statute, but provided that the punishment for criminal contempt shall be within the court's discretion. 18 U.S.C. § 401. This court has recently indicated that in imposing a sentence for criminal contempt, it is proer for the sentencing judge to consider, among other things, the sentence provided for the most analogous crime. See United States v. Gracia, 755 F.2d 984, 990 (2d Cir. 1985). In this case, Judge Weinfeld imposed a five-year sentence after determining that five years was the maximum allowable for the similar offense of obstruction of justice. On this record, a five-year sentence is not excessive.

Papadakis's arguments that the sentence should be reduced do not merit extended discussion. First, Papadakis contends that his refusal to testify did not result in the

"actual" obstruction of justice because the primary objective of the grand jury proceedings, obtaining indictments, had already been accomplished by the time he was called upon to testify. This argument mischaracterizes the scope of the grand jury proceedings. As discussed above, the government and the grand jury were continuing their investigation into the missing proceeds from the Sentry theft. They were also investigating persons who had not yet been indicted. Appellant's speculation that his testimony would not have furthered these investigations is unpersuasive.

Second, Papadakis argues that his sentence is disproportionate to the crime of criminal contempt. He claims that his failure to testify was not as serious as the refusal by the "terrorists" in United States v. Gracia, 755 F.2d 984 (2d Cir. 1985). In Gracia, this court reduced one defendant's sentence for criminal contempt for refusing

to testify before a grand jury from nine years to four years. In so doing, this court noted that nine years exceeded the maximum sentence that the defendant could have received had he been convicted for perjury, and that the sentences for criminal contempt given to his co-defendants were only one-half and one-twenty-seventh as long. 755 F.2d at 990. Reliance on Gracia is misplaced. The sentence Papadakis actually received does not exceed the maximum sentence that he could have received if he were convicted of obstructing justice. Obviously, the second Gracia factor --disproportionality of sentence as compared to what others received--is not implicated here.

Finally, Papadakis claims that Judge Weinfeld based his sentence on improper considerations because he relied on evidence submitted at the first Sentry trial, in which Papadakis was acquitted, in determining that

Papadakis knew the location of the proceeds from the Sentry theft. Papadakis bases this claim on the following statement made by the judge at the sentencing hearing:

> On the totality of the record of both Sentry trials, this Court has not the slightest doubt, as the Government charges, that Papadakis was an active participant in the staged hold-up and received in excess of two million dollars.

When viewed in its proper context, this statement by the judge does not support appellant's claim. Review of the entire transcript of the sentencing hearing reveals that Judge Weinfeld recognized that Papadakis was entitled "to the benefit of the acquittal on the first trial." It is also clear that Judge Weinfeld's statement concerning Papadakis's involvement in the Sentry theft was based on Eddie Argitakos's testimony at the trial of Gregory over which Judge Weinfeld also presided, and not on evidence from the first Sentry trial. We therefore

need not consider appellant's argument, which ignores our decisions in United States v. Roland, 748 F.2d 1321, 1327 (2d Cir. 1984) and United States v. Sweig, 454 F.2d 181, 184 (2d. Cir. 1972), that evidence from the trial in which Papadakis was acquitted could not properly have been considered in sentencing him for criminal contempt.

The judgment of the district court is affirmed.[2/]

F O O T N O T E S

1/ Along with another defendant, Gregory was convicted after a trial before Judge Weinfeld, and this court affirmed the convictions. See United States v. Gregory, Docket No. 85-1179 (2d Cir. Oct. 3, 1985)

2/ Appellant has also moved for bail pending appeal. That motion is denied.